



# United States Department of the Interior

## BUREAU OF LAND MANAGEMENT

Montana State Office

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Billings, Montana 59107-6800

IN REPLY TO:

SDR-922-01-04

SDR-922-01-05

SDR-922-01-06

SDR-922-01-07

MTM-74615

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May 21 2001

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

### DECISION

Northern Arapaho Tribe

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SDR-922-01-04

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SDR-922-01-05

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SDR-922-01-06

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SDR-922-01-07

### AFFIRMED AS MODIFIED

The Sierra Club with the National Trust for Historic Preservation (Trust), Eastern Shoshone Tribe (E. Shoshone), Northern Arapaho Tribe (N. Arapaho), and the Crow Tribe (Crow) request four separate State Director Reviews (SDRs) of the February 5, 2001, Decision Record and Finding of No Significant Impact (Enclosure 1) approved by the Bureau of Land Management (BLM) Billings Field

Manager. Since the February 5, 2001, Decision is based on an environmental assessment (Enclosure 2), prepared in response to the filing of an Application for Permit to Drill (APD) Federal oil and gas well No. 15-28, on MTM-74615, by Anschutz Exploration Corporation (Anschutz) under 43 CFR 3162.3-1, it is subject to this review according to 43 CFR 3165.3(b).

All four SDR requests were considered timely filed between March 6 and 8, 2001, in accordance with 43 CFR 3165.3(b), and assigned numbers SDR-922-01-04, SDR-922-01-05, SDR-922-01-06, SDR-922-01-07 (Enclosures 3-6). The Trust also requested a meeting with the State Director. This request was handled with an oral presentation according to 43 CFR 3165.3(d) on May 7, 2001.

All four SDRs are consolidated because they each request review of the same Decision and raise similar issues. In addition, the SDRs filed by the E. Shoshone, N. Arapaho, and the Crow all reference the Trust SDR and agree with the issues presented in it.

The Trust SDR identified several parties as co-appellants, including the three Tribes which filed timely SDRs. The May 7, 2001, oral presentation (Enclosure 7) and documents submitted during the oral presentation are also considered in this review.

#### **BACKGROUND**

This section is included to supplement and clarify the background presented by the Trust in their SDR, and demonstrate that the BLM Billings Field Office (BiFO) has continually recognized the cultural resources present in the Area and has taken extraordinary steps to inventory and protect these resources. At the request of the E. Shoshone Tribe, we have dropped the geographic name of the area of interest from all descriptions in this Decision and use the term "Area".

The Area was first recognized by professional archaeologists in the 1920s when anthropologist, Dr. John Provinse, photographed pictograph panels in the Area. In the early 1960s, Stewart Conner, of the Billings Archaeological Society (BAS), acquired copies of the photographs and, in 1964, relocated and recorded for the national database the site identified by Provinse. In the following 20 years, seven additional rock art sites were recorded in the Area by interested local residents and BLM employees.

In 1984, the Carbon County Preservation Office provided funding for the University of North Dakota (UND), to re-locate and formally record the 30+ known rock art sites in Carbon County, including the eight known for the Area. In 1985, Lawrence Loendorf, directed the UND field crew in relocating and recording the sites. At least one additional rock art site was identified in the Area at that time.

The 1984 Billings Resource Management Plan (RMP) made a decision to lease the

entire Area for oil and gas exploration and development. However, it was identified as an area sensitive to oil and gas leasing and specific sections with known sites, were identified as areas that would require special stipulations.

In 1985, the BLM prepared a cultural resources management plan (CRMP) to address the special management believed necessary to protect the exceptional prehistoric site concentration in the Area. The CRMP was put into effect September 6, 1986. In the BLM system for cultural resource evaluation (see BLM Manual 8111.2), specialists identify appropriate "use categories" to guide management decisions for those cultural resources. Assigned uses may change as new information becomes available. The CRMP identified two of the eight known sites that are of singular importance and rarity in the context of Northwestern Plains archaeology. These two sites were to be conserved in place for the future. The other six known sites were not considered as important, and could be made available for appropriate scientific or other uses. The 1986 CRMP noted that additional rock art sites were probably in the Area, but their locations had not yet been identified. The CRMP proposed a BLM inventory of a sample of adjacent Federal lands, specifically to locate additional rock art.

Based on the locations of the eight known rock art sites, in 1985, the BLM implemented protective management by withdrawing 600 acres from settlement, sale, location, or entry for a 20-year period beginning March 7, 1988. The withdrawal overlapped lease MTM-66836 where 520 acres were withdrawn, and on lease MTM-63661 (from which lease MTM 74615 was created by assignment effective September 1, 1987) where 80 acres were withdrawn.

The two leases held by Anschutz were issued in 1985 and 1987 with resource protection measures, based on cultural resource information on file at the time. Federal lease MTM-66836, including 2,481.15 contiguous acres, was offered in a public drawing in August 1985. A successful applicant for the lease was found in the fall of 1986, and the lease became effective for 10 years beginning on April 1, 1987. Based on the presence of the eight rock art sites known at that time, and on what was believed to be an aboriginal "vision quest" structure, a special stipulation for the protection of cultural resources was recommended by the BiFO. The special stipulation was attached to the lease. The special stipulation prohibits surface occupancy or disturbance (NSO) for the acres previously identified for withdrawal, and for an additional 40 acres in the upper part of the watershed.

The second of the two leases, Federal lease MTM-74615, consisting of 160 contiguous acres, was originally part of Federal lease MTM-63661 that became effective for 10 years beginning September 1, 1985. A portion (i.e., 80-acre tract that was also withdrawn from mineral entry) of this lease, also prohibited surface occupancy to protect the eight rock art sites known at that time. This large lease was broken into smaller units between August 1985 and August 1987, and MTM-74615 was created by record title assignment on September 1, 1987. The same lessee who owned rights to lease MTM-66836, also

owned the rights to lease MTM-74615. A special stipulation attached to the original lease, MTM-63661, applies to the 160 acres that were designated as lease MTM-74615. The stipulation gives notice that "additional stipulations concerning site monitoring during drilling activities may be placed on APDs.

An information notice (Enclosure 8) for cultural and paleontological resources was attached to both of the leases before they were issued. The notice includes measures the lessee or operator must take before undertaking surface disturbing activities on the lease. It includes cultural resource inventory and mitigation requirements. A portion of the notice informs the lessee that "where impacts to cultural resources cannot be mitigated to the satisfaction of the SMA, surface occupancy on that area must be prohibited". A comprehensive oil and gas lease stipulation (Enclosure 8) for many resource values was also attached to the leases. It states that special areas may exist within the lease, and that surface occupancy or use may be strictly controlled or, if absolutely necessary, excluded. It also states that use or occupancy will be restricted only when the BLM demonstrates that such restriction is necessary for the protection of such special areas and existing or planned uses. The special area identified in this stipulation that applies to cultural resources is, "300 feet from occupied buildings, developed recreational areas, undeveloped recreational areas receiving concentrated public use, and sites eligible for or designated as National Register sites."

In 1986, a cooperative agreement was made with UND to inventory additional lands in the Area. In the late summer and fall of 1987, the UND field crew inventoried 1,160 acres in the watershed. The inventory identified 36 previously unknown archaeological sites, including 23 sites with prehistoric rock art panels.

In 1988, the BLM requested proposals for inventory of additional lands in and around the Area. Between September 20 and October 1, 1988, a combined Larson-Tibisar Associates, Inc., (LTA) and UND crew inventoried 1,320 acres, mostly on lands adjacent to the Area watershed. As a result, an additional 18 previously unknown sites with prehistoric rock art panels were identified.

In 1992, the Area was nominated as an Area of Critical Environmental Concern (ACEC) for its outstanding value to our National cultural heritage. The process of ACEC nomination, analysis, and designation is a legal and regulatory tool (FLPMA 202.3; 43 CFR 1610.7) intended to identify resources, values, systems, or processes that are exceptional (meeting defined relevance and importance criteria), and that require special management for protection. The ACEC nomination, analysis, and designation process does not create exceptional environmental values, but it recognizes exceptional values that already exist on the land. The Area, including both of the leases Anschutz holds, was designated an ACEC March 10, 1999 (Enclosure 9).

On December 3, 1993, the designated operator, Blackford Energy Company (Blackford), filed four APDs. Three APDs were on MTM-66836, and one was on MTM-74615. The environmental review and Native American consultation process

started after the APDs were originally filed on December 3, 1993. The lessee had the four proposed well locations inventoried for cultural resources, along with Federal portions of a proposed access road. Additional inventory was required by the BLM for an area of vertical rock faces 1,000 feet long, adjacent to one of the proposed well locations. The archaeological fieldwork was conducted on January 22, 24, and 25, 1994, with the final report submitted to the BLM in February 1994. One early 20th century historic site was identified that is not considered eligible for the National Register, either alone or as a part of a larger historic property.

On March 2, 1994, an open house was held as part of a public participation process for the BLM's environmental assessment. A site inspection of the drill sites and surrounding landscape was conducted the same day. This trip was the first trip organized by the BLM for the proposed wells that included Tribal cultural directors.

On March 11, 1994, the lessee, W.G. Boonengerg, requested a suspension of operations and production on both leases because decisions for the four APDs on file would be delayed while the BLM conducted further environmental analysis and Native American consultation. The BLM Miles City District Office (MCDO) approved the suspension of operations and production on both leases, effective March 1, 1994, the first day of the month that the suspension request was filed. The approval stated the suspension will terminate when the APD is approved or denied, or when the BLM decides the suspension is no longer in the interest of conservation.

On October 4, 1995, W.G. Boonenberg, assumed operations for two of the original APDs filed by Blackford. Drilling plans for the two remaining APDs on MTM-66836, were cancelled and the MCDO returned them unapproved to Blackford.

On October 10, 1996, W.G. Boonenberg, transferred operations under MTM-66836 and MTM-74615 to Anschutz. Anschutz re-filed well number 15-28 on MTM-74615 on October 25, 1996, to establish priority for APD processing, while keeping well number 824-28-4 on MTM-66836 as its second priority. At this time, the BiFO, decided to evaluate both APDs and the related right-of-way for an access road with an environmental assessment (EA). The proposed action included road and well pad construction activity, drilling and testing two wells, and possible completion and production from both wells. Anschutz became the record title owner, of MTM-74615 and MTM-66836, on February 1, 1998.

The EA process continued with additional public participation, consultation with Indian Tribes, and public review of the EA (Enclosure 1, page 4 and Enclosure 2, pages 3-4), until the BiFO decided it could not sign a Finding of No Significant Impact (FONSI), in February 2000 (Enclosure 2, page 5). Anschutz subsequently changed their plans and decided to limit their proposal to determine if commercial quantities of hydrocarbons actually exist in the Area. On May 15, 2000, Anschutz submitted a new APD for the number 15-28 well

on MTM-74615, that effectively replaced the APD filed for well number 15-28 on October 25, 1996. This new APD only proposed drilling, testing, and well bore activities designed to prepare the well for completion. The EA under review started with this action.

Continued scoping of the potential issues and impacts of this project prompted the BLM to propose a cultural inventory of the private surface that the proposed access road would cross, so that effects to historic properties in those areas could be taken into consideration. Permission was given by the landowner for inventory of the private lands. Cultural materials were also observed on Federal portions of the project area, that had not been identified by the 1994 inventory, so all the Federal lands along the proposed access route and the area around the proposed well location were re-examined. In June and July 2000, the BLM archaeologists performed a Class III cultural resources inventory of approximately 97 acres within the ACEC and on adjacent lands, including the entire access route and the well location. As a result, 12 previously unidentified archaeological sites were discovered, two previously recorded sites were found to extend across the access route, and 52 instances of isolated prehistoric and historic materials were found.

#### STATE DIRECTOR REVIEW POINTS

The issues raised by the combined SDRs are enumerated below, followed by the appellant's findings and supporting arguments in italicized text and our response to the issues raised.

#### 1. ILLEGAL SEGMENTATION AND FAILURE TO ACKNOWLEDGE AND EVALUATE CONNECTED ACTIONS AND CUMULATIVE IMPACTS

*a) The construction of the exploratory well meets the third criteria under NEPA for connected actions (i.e., are interdependent parts of a larger action and depend on the larger action for their justification). The appellant(s) claim the exploratory well does not have independent utility in this case as its sole purpose is the further production of oil. The contention is also supported with a quote from the Decision Record that provides one of the reasons why the no action alternative was rejected. The contention goes on to state that, because the BLM failed to evaluate the exploratory well and the ultimate production wells as connected actions, it also failed to address the issue of the cumulative impacts from the exploratory well if hydrocarbons are found and production wells are permitted. The appellant(s) also claim the applicant will have expectations to be able to produce the resources discovered, if producible quantities of oil and gas are found. The claim goes on to state: "the BLM will be faced with the preparation of a full-scale EIS under circumstances in which resource conflicts are more irreconcilable than they are now, and mitigation alternatives are more constrained than they are now."*

The APD for the 15-28 well does not propose or contemplate a single well

production scenario, nor would such a scenario automatically occur as a result of the drilling of the proposed well. The drilling and testing of the 15-28 well is an independent action with independent utility, and is not an interdependent part of a larger action.

Single well or multiple well development is not part of the proposed action. Onshore Oil and Gas Order No. 1, issued by the BLM as part of its oil and gas regulations, provides instructions for the submittal of APDs on Federal and Indian oil and gas leases. This Order requires the applicant to submit specific plans for drilling and surface use. Under Order No. 1, plans for production facilities are not required if such plans are not known and cannot be accurately presented. This is typically the case with exploratory drilling proposals. However, under these circumstances, if a permit to drill is issued and hydrocarbons are found, the installation of production facilities and their use is not authorized and must be permitted separately, and evaluated under the National Environmental Policy Act (NEPA).

Neither approval of the proposed action, nor selection of any of the alternatives considered in the EA would commit the BLM to approval of future actions including additional drilling, well production or field development. The Decision Record (Enclosure 1, page 1) states: "Should commercial quantities of hydrocarbons be encountered, the well would be readied for completion; however, no production would occur until further NEPA analysis has been done." This analysis would address the cumulative impacts caused by production and possible field development (Enclosure 2, page 6), and the BiFO has already determined that an analysis of production activity would require an environmental impact statement.

The proposed well is classified as a wildcat well. This type of well is an exploratory well drilled in a geologically unproven area. Such wells are highly speculative. As stated by the appellant(s), Anschutz believes this well has a 1 in 7 chance of finding producible hydrocarbons, a slightly higher than average chance for a wildcat well. This estimate is in part based on the two other unsuccessful wells that have been drilled in the Area, within the last 48 years (i.e., one in 1953 and the latest in 1986). Although the well proposal may have a slightly higher than average chance for production, neither well drilled to date has proven successful. In addition, the closest successful oil and gas wells are located in the Frannie and Elk Basin oil and gas fields approximately 8 miles southeast and southwest of the proposed well site. Therefore, the proposal is still a wildcat drilling test. Production and field development rarely occur as a result of wildcat drilling tests, so that approval of the proposed action clearly would not "automatically trigger" other actions (i.e., production and field development), which may require EISs.

The scope of the EA is consistent with the NEPA regulations because production and field development are not "connected actions" to the proposed action (i.e., exploratory well drilling, evaluation and testing). The proposal is not dependent upon other previous or simultaneous actions, before it can proceed; and it is not dependent upon production or field development for its justification. The drilling of a wildcat well is fully justified on the basis of its purpose and intent to test for the possible presence of hydrocarbons.

Given the low probability of a wildcat well being completed as a producer, this type of operation would not occur if it was contingent upon, or depended on, production or field development for its justification. Therefore, the proposed action has independent utility and does not "depend" on well production or field development for its justification.

The proposed action is not a "cumulative action." It would not occur simultaneously with other proposed actions (e.g., other drilling activities, field development) having cumulative impacts. The development of production wells are not reasonably foreseeable (i.e., likely or expected), particularly in light of the fact that wildcat drilling is highly speculative.

Finally, the BLM's reliance on a Federal lessee's obligation to develop its lease as part of its reason for rejecting the "no action" alternative does not connect drilling a wildcat well to future production activity. A lessee would never attempt, and the BLM would never require a lessee, to produce a well that is not capable of production.

*b. The appellant(s) believe the subject EA is an illegal segmentation of the project the BiFO previously determined would result in significant impacts. This complaint states: "While perhaps technically the proposed well would be categorized as a wildcat well, this effort cannot legitimately be described as merely exploratory, nor as being pursued solely for the purpose of obtaining information about the geologic structure with no intent to produce from the well". Appellant(s) believe the appropriate standard for evaluating environmental consequences is assuming the project will be successful. They also claim a full EIS at this stage will better assure protection of cultural and spiritual values, and make less impact-intensive options, such as airlifting viable. The appellant(s) also state: "Given the significant cultural, and spiritual values of the Area, which the Federal Government has a trust obligation to protect, the admitted likely full development of the property should be considered in an environmental impact statement before development is started".*

The previous analysis and its findings does not make the subject proposal by Anschutz and the BLM's method to address it illegal. For the reasons stated under (1a) the EA is consistent with NEPA regulations.

While production and field development is not proposed, probable or reasonably foreseeable, it is possible; otherwise the Anschutz No. 15-28 would not be proposed. For this reason and in response to the issue being raised by the public, Appendix C of the EA provides, for informational purposes, a discussion of the scope of potential production and identifies the geographic location of the highest potential production area, well numbers, and locations.

Without acquiring information regarding the characteristics and quantity (if any) of hydrocarbon reserves in the Area, scenarios of future development and an accurate feasibility study of alternatives would, at this time, be completely speculative. For these reasons, the BiFO decided that assuming

production of one or several wells at this stage of Anschutz's exploration program is premature. It is also more likely that a full EIS, completed when the nature of the hydrocarbon potential is better defined, would provide more opportunities for exploring ways to assure protection of cultural and spiritual values.

**2. INADEQUATE CONSIDERATION OF ALTERNATIVES - THREE ALTERNATIVES, DIRECTIONAL DRILLING, BUY-OUT OR TRADE-OUT OF OIL AND GAS RIGHTS, AND NO ACTION, WERE NOT PROPERLY CONSIDERED.**

*a) While two deviated drilling alternatives and a horizontal drilling alternative are identified, no specific conclusion is reached about the efficacy of these alternatives, except for horizontal drilling. The discussion of deviated drilling lacks any data, projections, predictions, or probabilities about most of the variables listed that complicate deviated drilling over vertical drilling. The appellant(s) believe the deviated drilling location off-lease should be evaluated further because it is outside of the ACEC and requires a shorter access route with less Federal surface. Finally, the appellant(s) claim the deviated drilling discussion fails to include how different variables affect drilling from the off-lease site, or establish that deviated drilling is not viable. To support the claim about the lack of discussing variables at the off-lease site a list of variables and questions concerning such variables are included. The appellant(s) also believes the EA contains an unsupported statement, that the off-lease alternative site could require less blade work for road grading than the proposed action.*

A complete description of the deviated drilling alternative and the problems associated with using deviated drilling for a wildcat well in the subject area is discussed in the EA (Enclosure 2, pages 9-14 and 46-47). More specifically: the discussion of dip angle and its effect on drilling problems is discussed on page 46; page 46 and Appendix A-9, page 84 discusses faults and includes a map that shows the distribution of faults within the area; pages 46 and 47 discuss why the information from existing well logs enhances the concern about missing the porosity zones in the Ten Sleep Formation; and page 10 states the Mowry shales are encountered while drilling in the area. Although, it did not say so specifically, the Mowry is a Cretaceous marine shale that is present throughout the area, including the off-lease directional drilling location. The strata that would be drilled at the off-lease location is entirely sedimentary rocks (e.g., sandstones, shales, limestones). Although the EA characterizes the shales as "Mowry shales," the Mowry is just one shale formation and other shales are present. At least 95 percent of the rocks will be sandstones and shales, with few limestones. The same rocks will be encountered throughout the area, with little variation.

Despite the relatively close proximity of the closest oil and gas test well (i.e., Seaboard Oil Co. 53-28-G), it does not provide any data to accurately determine the depth of the Tensleep porosity zone. This is because the Seaboard well was drilled outside the area, which has been determined, through

seismic interpretation, to be within the fault block (see Enclosure 2, pages 30 and 31 for a description of the significance of the fault block). Differences in the surface elevations between the two sites, combined with the pronounced dip angle of the beds (i.e., up to 20 degrees), are additional factors that preclude predicting the depth of the Tensleep porosity zone, at the proposed well site, with data from the Seaboard well. The appellant(s) have not provided any factual information concerning geologic conditions at the off-lease deviated drilling site to show that the conditions discussed in the EA, either incorrectly or insufficiently, characterize the deviated drilling alternative, or the risks associated with deviated drilling a wildcat well in the subject area.

The appellant's claim about the EA containing an unsupported statement that the off-lease alternative site could require less blade work for road grading than the proposed action is incorrect. The EA concludes (Enclosure 2, page 14) that more blade work may be required on the access road for the off-lease deviated drilling site than the proposed action. This conclusion is based on knowledge of the area and its soils, and the differences in geographic relief along the access road, compared to the proposed access route.

*b) The buy-out or trade-out of lease rights alternative is not identified, nor is it analyzed in the EA. Failure to consider this alternative violates the requirements of NEPA.*

Although the public has asked the BLM, about the possibility of buying back or trading leases, it has not been suggested as an alternative, that should be included in the subject EA process until now. Therefore, the BiFO did not violate NEPA by failing to consider a buy-out or trade-out alternative.

However, since the appellant(s) are suggesting BLM include a buy-out or trade-out alternative now, it is considered in this review. Authority to compel Anschutz to accept either a buy-out or trade-out, and to empower the Secretary of Interior to implement it would have to come from Congress and the President in the form of enacted law. No one, including the appellant(s), has suggested any unleased lands of equivalent size, geology and potential which might be made available, or how they might be discovered, or how value could be determined for a buy-out. It is not reasonable to analyze such an alternative because there is no notion of feasibility, the possibility of implementing it is highly remote, and it would probably not provide sufficient information to permit a reasoned choice of alternatives.

*c) The analysis of the no action alternative states that the standard stipulation does not apply because there is no site eligible for the National Register of Historic Places within 300 feet of the proposed well. This assertion is flatly inaccurate. The entire ACEC is considered eligible for the National Register based on its traditional cultural values, the boundaries of which encompass the leasehold. The appellant(s) claim, the BLM has unlawfully foreclosed the No Action alternative, and meaningful consideration of this alternative, by failing to comply with NEPA before executing the leases.*

The EA does include a no action alternative and it is analyzed. The BiFO has not foreclosed the No Action alternative because the EA clearly recognizes, that a given APD can be denied (Enclosure 2, page 15).

The appellant's claim concerning the accuracy of the BiFO's determination about the standard stipulation is based on the fact that the entire ACEC is considered eligible for the National Register. While the entire ACEC is eligible, it is eligible as a "Archaeological District" and the stipulation specifically identifies "sites" eligible as one of the special areas covered by the stipulation. The intent of the stipulation is to protect "sites" and there is distinction between these categories of historic properties for purposes of National Register eligibility or nomination (Enclosure 10). Therefore, the BiFO's conclusion about application of the standard stipulation is correct, because the proposed drilling site is located approximately one-quarter mile (Enclosure 1, page 5), from any known cultural "site" eligible for the National Register of Historic Places.

*d) The BLM has failed to evaluate all reasonable alternatives to avoid environmental and cultural impacts to the ACEC before allowing the resource values within the ACEC to be comprised.*

The appellants offered other alternatives, such as airlifting in their written SDRs and called for exploring ways to resolve the issues during the oral presentation. No specific facts or ideas were presented to describe, identify, or support the feasibility of other alternatives that were not considered in the EA, including the airlift alternative. The BiFO adequately considered alternatives to the proposed action in compliance with NEPA.

### **3. FAILURE TO COMPLY WITH THE FEDERAL LAND POLICY AND MANAGEMENT ACT (FLPMA) AND MINERAL LEASING ACT (MLA)**

*a) The FLPMA recognizes that multiple use activities may take place within a particular ACEC, provided that special management attention is given "to protect and prevent irreparable damage to important, historic, cultural, or scenic values." The proposed exploratory well and access road will cause irreparable damage. This conclusion is included in BLM's EA at page 22, which states that impacts to identified traditional cultural values could not be mitigated while implementing the preferred alternative.*

Appellant(s) attempt to use the definition of an ACEC, found in FLPMA, to develop an absolute FLPMA standard. The definition of ACEC gives BLM management direction for such areas, but the BLM's decisions concerning management of development activities must balance this direction with FLPMA's recognition of valid existing rights (43 USC 1701). The BiFO clearly recognizes the management requirements of the ACEC, and has taken action during the EA and National Historic Preservation Act compliance process to protect and prevent irreparable damage to historic, cultural, and scenic values. These actions are in compliance with FLPMA.

*b) Direct physical damage to archeological sites from the access road violates*

*the mineral leasing act because the act requires that rights-of-way must protect natural resources associated with public lands and prevent unnecessary and undue environmental damage to the lands and resources. The BLM's decision does not address concerns about road construction and use effects to sites that may be eligible for the National Register or avoid unnecessary and undue environmental damage, and therefore violates both FLMPA and the MLA.*

The EA (Enclosure 2, pages 21, 22, 40-42) Decision Record (DR) (Enclosure 1, page 3), and Memorandum of Agreement (MOA) (Enclosure 11), under 36 CFR 800.5(e)(4) address the concerns related to the access road identified by the appellant(s). These same documents, and Appendix D and E address measures taken to avoid unnecessary and undue environmental damage. These actions are in compliance with both the MLA and FLMPA.

*c) Oil and gas drilling in the Area is not in conformance with the Resource Management Plan and therefore violates FLPMA. The 1994 RMP amendment specifically requires the use of a NSO stipulation to protect cultural resources within the Area. Since BLM has failed to invoke the NSO stipulation, it has failed to conform to the RMP. The subject lease was executed under an outdated RMP, therefore, it represents former planning direction, not the current planning direction.*

The 1999 ACEC Plan Amendment also permits oil and gas leasing in the Area with NSO stipulations. However, it completely eliminates the possibility of modifying the NSO stipulation within the Area. The BiFO Decision recognizes existing planning direction for the Area, that includes special measures to protect resource values.

The appellant(s) are correct, the subject lease was issued under a previous RMP. It was leased in conformance with oil and gas leasing decisions for the September 1984, Billings RMP. The action under review and the decision made by the BiFO is not a leasing action/decision, therefore the type of lease stipulation in effect and whether it matches existing planning direction is not a plan conformance issue. How the BiFO manages the proposed action, and whether it conforms to oil and gas operation management direction in existing land use plans, is subject to a plan conformance determination. The appellant(s) have not offered any arguments to question whether the BiFO's decision is in conformance with existing RMP direction for the management of oil and gas lease operations. The BiFO correctly concludes that its Decision is in conformance with the effective RMP for the BiFO.

#### **4. FAILURE TO COMPLY WITH THE NATIONAL HISTORIC PRESERVATION ACT (NHPA)**

*a) The Area has not yet been evaluated in light of its traditional religious and cultural significance to Indian Tribes, therefore, the BLM has failed to fulfill its statutory duties under Section 110(a) of the NHPA. The BLM failed to identify, evaluate, and nominate the Area for the National Register and, by approving the APD, the BLM failed to manage and maintain the Area in a way that considers the preservation of its historic and cultural values. The*

*adverse effects within the Area are treated solely as if they were effects or discrete, isolated sites, with value only for their archeological features.*

On March 24, 1998, the Montana State Historic Preservation Office (SHPO) fully supported the BLM's eligibility determination of the Area under criteria C and D and recommended consideration under criteria A (Enclosure 12). Further consideration of the Area for eligibility has been undertaken by the BiFO. The EA (Enclosure 2, pages 23 through 29) includes a section that addresses National Register evaluation of the Area, including affected criteria A qualities. This evaluation concludes, "This complex of historic properties is considered eligible for the National Register under Criteria A, C and D as a multiple-properties district."

The NHPA requires the BLM to develop a program to identify, evaluate, and nominate areas to the National Register. Failure to nominate the Area does not violate the NHPA provisions to "manage...in a way that considers the preservation of their historic, archaeological,...cultural values..." because an eligible property must also be managed according to these NHPA requirements.

The EA and its hard look at the cultural resource issues (Enclosure 2, pages 18-29 and 38-45) demonstrates that the BiFO has considered management for the entire Area, not just the archeological features or individual sites. Potential cumulative, long-term and residual effects from the proposed action are included in the EA, for discrete sites and the district as a whole. This consideration includes disclosure of how the proposal effects traditional religious and cultural significance to Indian Tribes.

*b) The MOA does not satisfy the BLM's Section 106 responsibilities. The MOA does not take into account any effects of the project on National Register eligible resources within the ACEC that have traditional religious and cultural importance to Indian Tribes. The MOA fails to take into account cumulative effects that may be a result of future oil and gas production, which the appellants believe are reasonably foreseeable. By placing a clause in the MOA, that denial is not a legal option and it has been eliminated from consideration, the BLM has suggested, it may have foreclosed the opportunity of the Advisory Council on Historic Preservation to comment on the project.*

The MOA (Enclosure 11) does take into account the effects of the project on National Register eligible resources within the ACEC that have traditional religious and cultural importance to Indian Tribes. It specifically includes a whereas clause that identifies the Area of potential effects to be the ACEC and Archaeological District, an Area that we have already described meets National Register eligibility, in part, because of its traditional religious and cultural importance to Indian Tribes. The MOA also includes a whereas clause that identifies an adverse effect on historic properties in the ACEC and Archaeological District, and stipulations to minimize or avoid potential adverse impacts, including effects to traditional Native American use of the Area.

Our response to contention No. 1 fully explains why future oil and gas

production is not considered reasonably foreseeable. These reasons form the basis for not including the effects of future oil and gas production in the MOA.

The appellant(s) do not provide any argument to support its concern about the possibility that the BLM has foreclosed the opportunity of the Advisory Council on Historic Preservation to comment on the project. A letter (Enclosure 13) from the Advisory Council to the Montana BLM State Director discusses the subject project, the MOA, and concerns raised by the appellant(s) in this review, but it is silent on the foreclosure issue raised in this contention. We find no merit in this claim.

*c) Executing the leases requires compliance with the NHPA in advance. By executing the leases before taking into account adverse effects and evaluating alternatives, the BLM restricted options to avoid, minimize, and mitigate adverse effects on historic resources. The approval of a mineral lease is, in and of itself, an undertaking. Appellant(s) cites the NHPA regulations and a January 5, 2001, letter from the Montana SHPO, to a BLM manager in Miles City, Montana (Enclosure 14) to support this claim. This letter references the subject project, but it is in response to an entirely different project. Appellant(s) go on to state that the BLM has essentially committed itself to an irreversible and irretrievable commitment of resources by approving the lease in the Area without complying with Section 106. This contention is supported by the whereas clause in the MOA that states: "the BLM has determined that denial of the application is not an available legal option and that denial has been eliminated from consideration."*

The history of the subject leases is included in the background section of this review. Oil and gas leasing decisions are made during BLM's Resource Management Planning process (BLM Land Use Planning Handbook, H-1601-1 Appendix C, page 16, 11/22/00). This is also the time BLM starts its planning efforts for cultural resources (36 CFR 800.1(c)).

The planning process often includes funding for resource inventories to bring resource data up-to-date before a plan is actually started. The subject Area already contained a substantial amount of data and it was identified as an area that needed special protection, with stipulations that would preclude surface occupancy. However, the stipulations for precluding surface occupancy were tied to identified sites or complexes. To make sure leasing would not result in a irreversible and irretrievable commitment of cultural resources, stipulations to avoid, minimize, and mitigate adverse effects on historic "sites" were also attached to the subject leases.

In the mid 1980s, when planning decisions were completed for the Area, and the subject leases were issued, the significance of landscapes to Indian Tribes and their traditional practices was not included as a criteria for evaluating National Register eligible properties under the NHPA. When the subject leases were issued, the BiFO determined that existing stipulations attached to the leases would protect known sites and complexes. They also determined that the stipulations attached to the subject leases would protect new "sites" discovered through intensive cultural surveys, if surface disturbing

activities were proposed

The BiFO determined project denial was not a legal option after evaluating the no action alternative in two EAs over a period of 7+ years. While the EA (Enclosure 2, page 15) recognizes that the BLM can deny a specific APD, it also recognizes that complete denial to enjoy a lease without 100 percent surface occupancy constraints is not a legal option, because of the surface use rights granted with the lease (43 CFR 3101.1-2). The EA process revealed that there would be no acceptable drilling sites, according to the Indian Tribes and other interested parties, within the boundaries of the lease. The claim that the project denial clause in the MOA demonstrates that leasing in the Area is an irreversible and irretrievable commitment of resources is without merit. The BiFO decided denial would not be a legal option because consultation with Indian Tribes and other interested parties, during the EA process, resulted in strong opposition to drilling anywhere in the Area. The public involvement process resulted in a conclusion that there was opposition to drilling on 100 percent of the leases. The appellant(s) have perpetuated this issue and offer no remedy to permit drilling activity someplace on the subject leases.

##### 5. FAILURE TO COMPLY WITH OR INVOKE NO SURFACE OCCUPANCY STIPULATIONS AND OTHER PROTECTIVE MEASURES IN THE LEASES

*The stipulation attached to the lease that states: "Any surface use or occupancy within...special areas will be strictly controlled, or if absolutely necessary, excluded." Those "special areas" include anything within "300 feet from...sites eligible for or designated as National Register sites." In this case, the entire area subject to the leases and the APD is eligible for the National Register. Appellant(s) reason that since the entire area is eligible for the National Register, it should be protected by the subject oil and gas lease stipulation. The "Notice" explicitly referenced and incorporated in the signed "Stipulations" clearly warns the lessee that "Mitigation may include the relocation of proposed lease-related activities...Where impacts to cultural resources cannot be mitigated to the satisfaction of the BLM, surface occupancy on that area must be prohibited." Appellant(s) also claim BLM's assertion that the lease provisions do not allow the BLM to exclude an operator from the surface of the leased area is erroneous because the regulations, require adherence to stipulations attached to the lease and do not limit the area of exclusion. Appellant(s) conclude:*

*"In light of these explicit stipulations, it is clear that BLM should avoid the entire.....Archaeological District as any surface-disturbing activity on the land would "significantly impact" the qualities exhibited in the Area. The BLM has acknowledged that adverse impacts within the ACEC will be "significant," ROD at 3, and that those impacts "could not be mitigated while implementing the preferred alternative." EA at 22 (emphasis added)."*

*Appellant(s) reason that the BLM's findings in the ROD and EA, and the SHPO's agreement, concerning adverse impacts and the effect of mitigation warrant imposition of the stipulation or notice to a degree which would avoid occupancy within the entire Archaeological District. This claim is also supported with the findings of several Indian tribes that the adverse effects essentially can not be mitigated.*

There is no dispute about the eligibility of the entire Area for the National Register. However, as previously described in our response to contention No. 2, there is a distinction between types of Historic Properties for the purpose of evaluating National Register eligibility (Enclosure 10). While the entire ACEC is eligible, it is eligible as a "Archaeological District" and the stipulation specifically identifies "sites" eligible as one of the special areas covered by the stipulation. The intent of the stipulation is to protect "sites." Therefore, the BiFO conclusion about application of the standard stipulation is correct, because the proposed drilling site is located approximately one-quarter mile (Enclosure 1, page 5) from any known cultural "site" eligible for the National Register of Historic Places.

The "Notice" is a companion of the "Oil and Gas Lease Stipulations" (Enclosure 8) attached to the subject lease. Even though these documents are together in the lease and the stipulation references the notice, only the stipulation is signed by the lessee. This notice provides information to the lessee concerning existing requirements (43 CFR 3101.1-3). It clarifies an existing requirement in Section 6 of the lease terms that: "... may require inventories or special studies to determine the extent of impacts to other resources." The other existing requirement the notice covers is the "stipulation" previously described for "sites" eligible for the National Register. The notice warns the lessee about the possibility that lease operations could be prohibited. Since a notice has no legal consequences (43 CFR 3101.1-3), the prohibition described must be within the terms of the lease, including the 300 foot exclusion distance from eligible "sites" included in the lease stipulation. Appellant(s) contention that the notice can be used to preclude occupancy within the Archaeological District is prohibited by the regulations at 43 CFR 3101.1-3, which state: "Information notices shall not be a basis for denial of lease operations."

Appellant(s) use a quote from page 3 of the February 5, 2001, Decision Record (DR) (Enclosure 1) to conclude that any surface-disturbing activity on the land would "significantly impact" the qualities exhibited in this Area. This conclusion is erroneous because the quote appellant(s) use from page 3 of the DR refers to findings from the EA terminated in February 2000, not the EA under review. Another quote from page 22 of the EA is used by the appellant(s) to conclude that the "significant" impacts could not be mitigated and the BLM should avoid the entire Area. This connection is not appropriate because the appellant's erroneously conclude that the DR identifies significant impacts from the proposed action. While all parties agree that potential impacts to identified traditional cultural values can not be mitigated, neither the oil and gas lease terms, stipulations, or notice can be used to avoid surface occupancy in the entire Area. The BiFO correctly

interpreted and applied the existing lease terms, stipulations and notice in its review of the proposed action.

## 6. UNLAWFUL EXTENSION OF THE LEASES

*The suspension has renewed the rights under the leases for purposes of NEPA and NHPA without performing the requisite evaluation of the impacts of the leases on affected cultural and environmental resources. Suspension of the leases is the equivalent of renewing or extending a lease and has the effect of unlawfully circumventing NEPA and NHPA.*

The suspensions referenced by the appellant(s) are suspensions of operations and production granted by the BLM's Miles City Field Office (MCFO) on March 28, 1994. The effective date of the suspensions is March 1, 1994. This type of action is normally categorically excluded from completing an environmental assessment (EA) or an environmental impact statement (EIS) according to the Department of Interior Manual 516 Section 6 - Appendix 5. The MCFO did not complete either an EA or EIS when it granted the suspension of operations and production on leases MTM-66836 or MTM-74615. The appellant(s) arguments do not provide any reasons why approval of the subject lease suspensions can not be categorically excluded from completing an EA or EIS. The suspension of operations and production did not circumvent NEPA and NHPA, it provided the lessee relief allowed under 43 CFR 3103.4-4, relief required because of the extended APD and lengthy environmental review process.

## 7. INADEQUATE CONSULTATION WITH INDIAN TRIBES

a) *The BLM has failed to carry out the provisions of an Executive Order, Secretary of Interior Orders, Department of Interior Manuals and a BLM Information Bulletin. Appellant(s) claim these orders and directives require each Federal agency to take actions (except where it violates essential agency functions) to avoid affecting the physical integrity of Native American sacred sites. Appellant(s) claim the BLM fails to comply with these orders and directives because: it has not adequately addressed the spiritual and religious concerns raised in the EA; several Tribes commented on the spiritual importance of the area; there are Tribes that still use the Area for religious and other ceremonial/traditional purposes; and mitigation does not adequately address the issues involved with the area as a whole having religious and spiritual significance.*

*These orders and directives require managers to use MOAs with Indian Tribes, and make special provision for Tribal administrative appeal.*

The appellant(s) claim fails to mention critical parts of the various orders and instructions. Section 3 of Executive Order (EO) No. 13007, "Indian Sacred Sites", states: "Nothing in this order shall be construed to require a taking of vested property interests." A section from the BLM Information Bulletin No. 98-132 (Enclosure 15) quoted by the appellant(s) to help define the EO's

direction to "avoid adversely affecting the physical integrity of such sacred sites" also provides BLM with an interpretation of important language in the EO. Enclosure 15 states:

"As stated in the Order, effects to the physical integrity of sacred sites are to be avoided to the extent practicable, permitted by law, and not clearly inconsistent with essential agency functions. This may be interpreted to say: ...Or to put it another way, make sure you factor sacred-site protection fully into the multiple-use balance."

The appellant(s) claim the mitigation measures that delay any activity during certain times of the year, do not adequately address the issues involved in the area as a whole having religious and spiritual significance. This claim is supplied with no ideas for resolution or reasons why the mitigation is not adequate. The EA, NHPA compliance record, and consultation with Indian Tribes, shows the BiFO is in compliance with EO 13007, other orders, and directives for protecting Native American sacred sites with consideration of valid property interests and the degree of impact expected from the proposed action (see contention number 9).

Departmental Manual 512 DM3 includes provisions that direct the BLM to develop guidance, including provisions, "where appropriate, to enter into a memorandum of understanding...." The guidance concerning MOUs suggests they include dispute resolution that would among other things, enable the Tribal governments to file an administrative appeal. The BLM includes these type of directives in its 8160 Manual for "General Procedure Guidance For Native American Consultation." The BiFO has not failed to follow directives in this case since the MOU development process is not mandatory.

*b) There are several tribes that were not made aware of the proposal and therefore were not able to submit comments.*

There are several Indian Tribes listed as co-appellants that were not included during consultation for the subject proposal. Many of these same Tribes, and others (e.g., Blackfeet Tribe) gave presentations during the oral testimony. The EA recognizes there could be other tribes with prehistoric ties to the Area that were not consulted and that some of the Tribes originally contacted declined to participate (Enclosure 2, pages 23-25 and Appendix F, page 109). The Standing Rock Sioux Tribe and Comanche Tribe expressed a desire to participate in the consultation process late in the process (i.e., January 16, 2001, and January 23, 2001), and after the public review period of the EA expired on December 1, 2000.

The Standing Rock Sioux Tribal Historic Preservation Office and Tribal representatives at the oral presentation allege the EA was never forwarded with the decision for a FONSI to the Tribes, thus limiting the amount of information received on the Federal action to potentially culturally affiliated Tribes. The allegation by the Standing Rock Sioux Tribe is correct. Several Tribes including the Standing Rock Sioux, that have not been involved with the subject project, did not receive the EA and unsigned FONSI.

However, the BiFO has openly involved the public in the EA process, worked on a government to government basis with four Indian Tribes (i.e., Crow Tribe, Northern Cheyenne Tribe, Eastern Shoshone Tribe, and Northern Arapaho Tribe) and also involved other Native American organizations or organizations that represent Native American interests. A reasonable process was used to consult on this project with Indian Tribes. The BiFO focused on Tribes and groups known to have an interest in the geographic area from cultural and historical research, and the BLM's experience establishing contacts for government to government relationships with Indian Tribes on other projects in eastern and central Montana. In addition, oral presentations by other Tribes did not change our understanding of the traditional cultural values of the Area. It confirmed the importance of the area expressed by the four Tribes the BiFO consulted with during the EA process. The BiFO has made a reasonable and good faith effort to obtain and consider appropriate Native American input for the Decision under this review.

#### 8. FAILURE TO ACCORD THE PROPER WEIGHT TO CULTURAL AND SPIRITUAL VALUES

*a) The agency should treat this entire ACEC as a single unit, only 34 percent of the ACEC has been inventoried. Allowing the exploratory well in this Area before completing an inventory of the ACEC does not comply with the agency's responsibilities under the statute.*

It is undisputed that only 34 percent of the Area has been inventoried. This is not a situation where failure to complete inventory contributes to under appreciation of the value of the cultural resources contained in the Area. The sheer volume of cultural resources found in the Area has constrained the ability of the BiFO to fully inventory the Area. The background section of this review summarizes the inventory efforts completed so far, of which there are many. As stated in our response to contention numbers 4a and 4b, the BiFO is treating the Area as a single unit under, and in compliance with, the NHPA.

*b) If the BLM is not willing to maintain the anonymity and the inaccessibility of the rock art in the Area by prohibiting oil and gas development, the agency must budget for, develop, and maintain adequate protection of these archaeological sites and rock art panels. The BiFO could have, and should have, included as a condition of approval a provision requiring Anschutz to accept financial responsibility for protection against vandalism within the ACEC during the life of the well. The appellant(s) reference a case where BLM attached a requirement, holding the applicant financially responsible for protection of vandalism and the Interior Board of Land Appeals affirmed BLM's requirement. The appellant(s) also request a full EIS to look at long-term protection of the Area and responsibilities Anschutz or other developers should carry.*

The BiFO has placed a high priority on protecting the cultural resources in the Area (see background section of this review). Even though the EA expresses concerns about the level of funding available to monitor the Area, it does contain a monitoring plan (Enclosure 2, Appendix D) that will increase the BLM's presence in the Area during road construction, drilling, and testing operations. Anschutz should not be held responsible for protection against vandalism in the ACEC because of its size and possible routes for unauthorized

access. The instant case does not compare with the case referenced by the appellant(s). The referenced case involved a well site perimeter within about 100 feet from a rock shelter and one isolated pictograph near the access road. However, we agree with the appellant(s) and feel more responsibility needs to be placed on Anschutz to prevent unauthorized use. The following conditions of approval are included to prevent unauthorized use by way of the access developed for the proposed well.

"Anschutz must install a gate at the entrance of the approved access road prior to road construction. The gate must remain locked during all phases of operation except for use by authorized personnel. In addition, Anschutz must have a security guard patrolling the approved access road and the well site during all hours of operation. Any unauthorized use of the access road/well site must be reported to the BLM. A log book showing the date and time of all authorized personnel in and out of the area must be maintained by Anschutz."

The EA (Enclosure 2, pages 60 and 61) recognizes increases in visitor use over the past 10 years and a correlation between such use and vandalism to the rock art. Visitation is also expected to increase because of the close proximity to Billings, Montana, and increasing demand for recreational opportunities. Evaluating long-term protection measures is an ACEC management issue and whether an EIS is necessary for this type of review is outside the scope of the proposed action.

*c) The EA does not take into account the service personnel that will visit the site and the numerous individuals with whom they talk daily about conditions in and around the well site.*

The EA does include a discussion of personnel working on the well and how information about the Area could spread to others. It also describes the potential impacts associated with this concern. It does not specifically refer to these employees as "service personnel" but generalizes employees as "company employees" (Enclosure 2, pages 41 and 43). The MOA and conditions of approval (Enclosure 2, Appendix E) also includes a specific requirement that applies to both employees and contractors. It states:

"Anschutz...would instruct their employees and contractors that activity off of the access road and well locations would not be allowed, unless in the company of, or at the direction of the authorized officer of the BLM. These conditions would apply during construction and drilling operations."

The EA adequately addresses potential impacts from service personnel

## 9. FAILURE TO PREPARE AN EIS

*a) The BLM has acknowledged that adverse impacts within the ACEC will be "significant", and that those impacts "could not be mitigated while implementing the preferred alternative".*

Appellant(s) use a quote from page 3 of the February 5, 2001, Decision Record (DR) (Enclosure 1) to conclude that the BLM has acknowledged that adverse impacts within the ACEC will be "significant." This conclusion is erroneous because the quote appellant(s) use from page 3 of the DR refers to findings from the EA terminated in February 2000, not the EA under review. Another quote from page 22 of the EA is used by the appellant(s) to conclude that the "significant" impacts could not be mitigated, therefore the BLM must prepare an EIS. This connection is not appropriate because the appellant's erroneously conclude that the DR identifies significant impacts from the proposed action.

*b) The EA identifies an irreversible impact to an ACEC that has been properly identified and designated by the BLM. The impact is therefore significant. The proposed action will irreparably impact the Area's cultural resources and for this reason alone the BLM should prepare an EIS.*

The appellant's reference to irreversible and irreparable impacts are not described in any detail except for a reference to page 22 of the EA (Enclosure 2). The EA, at page 22, includes a discussion about NHPA compliance and concludes, "An adverse effect determination was reached primarily because potential impacts to identified traditional cultural values could not be mitigated while implementing the preferred alternative." A finding of "adverse effect" on a historic property does not necessarily require an EIS under NEPA (36 CFR 800.8(a)(1)). The BiFO concludes the adverse effect is not a significant impact under NEPA because of the stipulations in the MOA (Enclosure 11) under 36 CFR 800.5(e)(4), the conditions of approval included in Appendix E of the EA and the short duration of the proposed action (Enclosure 1, page 1).

*c) By definition, the admitted disturbance of this site is most certainly "controversial" for the several Indian Tribes. The appellants refer to the consulted Tribes expressions that this Area is holy and should be protected from desecration. While one of the conditions of approval restricts drilling during the Spring and Fall ceremonies, drilling and development in the remainder of the year also impacts on the spiritual value of the area. These irreparable impacts are inherently "significant" for purposes of NEPA, and require preparation of an EIS.*

The four consulted Indian Tribes and other Tribes present during the oral presentation (Enclosure 7) all state that the Area has spiritual powers and emphasize the significant nature of the cultural, spiritual, and archaeological values of the Area. The Eastern Shoshone emphasize that the cultural and spiritual values should be reason to prohibit development or require the use of airlifts. The Northern Arapaho Business Council passed a resolution for the protection of the Area. This resolution also recognizes that the Area is a sacred area of significant cultural, religious, and historic importance to not only the Northern Arapaho but all other Indian Tribes in the region. Without exception, all of the Indian Tribes involved during the BLM's environmental review, and this administrative review oppose the proposed action. They also stress that the Area is important and the

proposed action, regardless of the mitigation drilling window will result in irreparable impacts to a sacred environment.

Appellant(s) reference 40 CFR 1508.27(b)(5) as a guide for review, but they do not claim the project results in effects that are highly uncertain or involve unique or unknown risks.

Under 40 CFR 1508.27(b)(4), the question regarding significance is whether the effects of the proposed action on the quality of the human environment are likely to be "highly controversial." This does not mean whether an action is subject to public opposition, but rather, whether it has generated any substantial dispute as to its size, nature or effect. See *Sierra Club v. U.S. Forest Service*, 843 F.2d 1190, 1193 (9<sup>th</sup> Cir. 1988); *Glacier-Two Medicine Alliance*, 88 IBLA 133, 143-44 (1985), and cases cited therein. The BiFO recognizes the importance of the area in the EA (Enclosure 2, pages 23-27 and pages 39, 41-43 and 60) and it does not dispute the size, nature or effect of the action. The summary of impacts, concludes, "Impacts to the cultural values would be the most adverse to any of the resources in the area. Also, this proposed...would be an intrusion to an area considered sacred by Native Americans." The appellant(s) have not presented any evidence that the effects discussed in the EA were wrongly predicted. The BiFO correctly decided that an EIS was not necessary (see our response to contention No. 9(b)). For these same reasons, we conclude that the effects discussed in the EA and the Decision Record are not highly controversial under NEPA.

#### DECISION

After careful review of the written SDRs and oral presentations, I affirm the February 5, 2001, Decision Record and Finding of No Significant Impact approved by the BLM Billings Field Manager. The BiFO completed a careful review of environmental problems, all relevant environmental concerns have been identified, the final determination is reasonable and the Billings Field Manager correctly determined an EIS was not necessary. The scope of the project is appropriate. The analysis of the environmental impacts from the project is comprehensive and its conclusions that these impacts, as the project is designed are not significant is correct. The determination that the negative effects would be short-term and not significant is reasonable. The fact that this project may be controversial to some does not automatically make its impacts significant. To alleviate concerns about potential vandalism the following conditions of approval are required and are hereby incorporated into the February 7, 2001, approved APD for the Anschutz Exploration Corporation No. 15-28 on lease MTM-74615.

Anschutz must install a gate at the entrance of the approved access road prior to road construction. The gate must remain locked during all phases of operation except for use by authorized personnel. In addition, Anschutz must have a security guard patrolling the approved access road and the well site during all hours of operation. Any unauthorized use of the access road/well site must be reported to the BLM. A log book showing the date and time of all authorized personnel in and out of the area must be maintained by Anschutz.

This Decision will not be effective during the time in which a party adversely affected may file a notice of appeal with the Interior Board of Land Appeals (43 CFR 3165.4(c)).

This Decision may be appealed to the Board of Land Appeals Office of the Secretary, in accordance with the regulations contained in 43 CFR 4.400 and Form 1842-1 (Enclosure 16). If an appeal is taken, a Notice of Appeal must be filed in this office at the aforementioned address within 30 days from receipt of this decision. A copy of the Notice of Appeal and of any statement of reasons, written arguments, or briefs must also be served on the Office of the Solicitor at the address shown on Form 1842-1. It is also requested that a copy of any statement of reasons, written arguments, or briefs be sent to this office. The appellant has the burden of showing that the Decision appealed from, is in error.

If you wish to file a Petition for a Stay of this Decision, pursuant to 43 CFR 3165.4(c), the Petition must accompany your Notice of Appeal. A Petition for a Stay is required to show sufficient justification based on the standards listed below. Copies of the Notice of Appeal and Petition for a Stay must also be submitted to each party named in this Decision and to the Interior Board of Land Appeals and to the appropriate Office of the Solicitor (see 43 CFR 4.413) at the same time the original documents are filed with this office. If you request a stay, you have the burden of proof to demonstrate that a stay should be granted.

#### Standards for Obtaining a Stay

Except as otherwise provided by law or other pertinent regulation, a petition for a stay of a decision pending appeal shall show sufficient justification based on the following standards:

- (1) The relative harm to the parties if the stay is granted or denied,
- (2) The likelihood of the appellant's success on the merits,
- (3) The likelihood of immediate and irreparable harm if the stay is not granted, and
- 4) Whether the public interest favors granting the stay.

In case of an appeal the adverse party to be served is

Mr. Todd Kalstrom  
Anschutz Exploration Corporation  
555 17<sup>th</sup> Street, Suite 2400  
Denver, Colorado 80202



Thomas P. Lonnie  
Deputy State Director  
Division of Resources